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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 23, 1963.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 4, 1963.

OPINIONS BELOW

The per curiam order of the Court of Appeals, accompanied by the concurring statement of Judge Rives, has not been reported. A copy of the order and the concurring statement appears in the appendix hereto. A copy of the unreported order of the District Court for the Northern District of Alabama, dated December 7, 1962, is also reprinted in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1963. On January 30, 1963, the Chief Justice of the United States signed an order extending the time in which to file this petition for a writ of certiorari to and including February 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is contrary to the proper administration of federal criminal justice to deny criminal defendants a hearing and determination of a coram nobis petition, seeking a new trial on the basis of a conceded violation of the Court Reporter Act, simply because the violation had not been discovered and raised in the original proceedings before the District Court or the Court of Appeals.

2. Whether a conceded violation of the Court Reporter Act, whereby the prosecutor's summation to the jury was not recorded so as to make possible the discovery and correction of plain errors committed therein, constitutes reversible error warranting a new trial.

STATUTORY PROVISIONS INVOLVED

The Court Reporter Act, 62 Stat. 922, 28 U.S.C. § 753(b):

> "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the ap-

proval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding."

STATEMENT OF THE CASE

The relevant facts in this case can be summarized as follows:

1. Petitioners were convicted, after a jury trial in the United States District Court for the Northern District of Alabama, of mail fraud and use of the mails in the fraudulent sale of securities in violation of 15 U.S.C. § 77q(a) and 18 U.S.C. § 1341. Motions for new trial were denied and prison sentences were imposed.

2. The convictions were affirmed on appeal to the Court of Appeals for the Fifth Circuit. 298 F. 2d 405. That court held, *inter alia*, that petitioners had received a fair trial despite claims that the trial had been conducted in an atmosphere of hostility and prejudice. More specifically, the court stated that it had "carefully reviewed this record" and concluded that there was "no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 295 U.S. 78." 298 F. 2d at 411.

3. On October 8, 1962, this Court denied a petition for a writ of certiorari which sought review of the holding that the alleged atmosphere of hostility and prejudice did not preclude a fair trial. 371 U.S. 830; No. 145, Oct. Term 1962.

4. Simultaneously, this Court denied petitioners' motion to vacate and remand the proceedings in light of the admitted fact that the court reporter had failed to record or transcribe the prosecutor's argument to

the jury. 371 U.S. 830. That motion raised for the first time in the proceedings the court reporter's failure in this respect, a failure which was in direct violation of the mandatory provisions of the Court Reporter Act, 62 Stat. 922, 28 U.S.C. § 753(b), and which made it impossible for any court to notice and correct any plain error involved in any unduly hostile or prejudicial remarks made to the jury by the prosecutor. Accompanying the motion was an affidavit by the reporter conceding that he had not recorded any portion of the final argument "because it was his custom not to take down any such arguments" and that there had been no agreement by counsel to the effect that such arguments should not be recorded. The reporter further conceded, in an affidavit submitted by the Government, that he had not recorded the summations but stated that he had been present during the oral arguments for purposes of noting any objections and rulings thereon and that no such objections had been made. Affidavits were also submitted by the petitioners and their trial counsel attesting to the fact that the prosecutor's final argument had been replete with prejudicial remarks that served to inflame the hostility surrounding the trial. Reference was made in the motion to various lower court decisions, particularly *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5), holding that such a statutory violation by a court reporter in and of itself constituted reversible error requiring a new trial.

5. The Government, in opposing the motion to vacate and remand, conceded the failure of the court reporter to record the final arguments. No effort was made to counter the allegations that the prosecutor had indeed made inflammatory remarks in his summation. The opposition was premised solely on the proposition that

the objection to the reporter's violation of the statute came too late in the proceedings. To that proposition the petitioners replied that the defect had only recently been uncovered and that it was too fundamental, too destructive of the appeal process, to permit it to be overlooked, particularly on a direct appeal from a conviction.

6. Since this Court's denial of the motion to vacate and remand was without comment and hence without prejudice to renewing the contention in the lower courts, petitioners on October 15, 1962, sought leave to file a second petition for rehearing in the Court of Appeals based upon the reporter's failure to obey the dictate of the Court Reporter Act. On November 26, 1962, the Court of Appeals granted leave to file the second petition and thereupon denied it without comment.

7. Thereafter the petitioners filed in the United States District Court for the Northern District of Alabama, the trial court, petitions "in the nature of a writ of error coram nobis for new trial." These petitions restated the history of the proceedings and alleged that the statutory violation by the court reporter had infected the fairness of the appellate process by virtue of the inability of the higher courts to correct any plain error committed by the prosecutor in his summation. The petitions requested that (1) the judgment and sentence of the District Court be vacated and the petitioners granted a new trial and (2) the court stay the force and effect of the Court of Appeals mandate until the ultimate determination of the coram nobis petitions.

8. On December 7, 1962, the District Court entered an order (reprinted in the appendix hereto) continuing

a hearing on the coram nobis petitions pending a ruling by the Court of Appeals with respect to granting the District Court permission to hold such a hearing. The court stated its opinion that "in view of the fact that the Court of Appeals has affirmed the judgment of conviction, the petitions should have been in the first instance presented to that Court," citing *Strang* v. *United States*, 53 F. 2d 820 (C.A. 5), *Young* v. *United States*, 138 F. 2d 838 (C.A. 5), *Garrison* v. *United States*, 154 F. 2d 106 (C.A. 5), and *Taylor* v. *Alabama*, 335 U.S. 252, 261.

9. In light of the District Court's order, petitioners filed in the Court of Appeals a petition seeking the grant of permission to the District Court to entertain and hear the coram nobis petitions. Alternatively, petitioners sought leave to file in the Court of Appeals the coram nobis petitions. The Government filed an opposition, asserting that this Court by its action in denying the motion to vacate and remand (371 U.S. 830) had ruled adversely as to the relief sought in the coram nobis petitions and that this ruling "is now the law of the case and is binding on this Court and the United States District Court."

10. On January 4, 1963, the Court of Appeals entered a per curiam order (reprinted in the appendix hereto) denying both the petition for the grant of permission to the District Court to entertain and hear the coram nobis petitions and the application for leave to file the coram nobis petitions in the Court of Appeals. Circuit Judge Rives, concurring specially, wrote that there seemed to him "no good reason for petitioners' failure to object at the trial to the non-recording of the oral arguments and to the claimed prejudicial arguments when made, or for their failure to supplement the

record on motion for new trial, in either of which events the objections now raised could have been fully presented on their appeal." He concluded "that no sufficient need appears for the extraordinary remedy of a writ of coram nobis."

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has completely frustrated petitioners' efforts to challenge by coram nobis the conceded violation of the Court Reporter Act and the resulting obstruction of their appeal rights. In so doing, the Court of Appeals has rendered a decision in direct conflict with this Court's ruling in *United States* v. *Morgan*, 346 U.S. 502, and with determinations of other federal appellate tribunals.

The decision below necessarily involves important and basic questions about the fair and even-handed administration of criminal justice in the lower federal courts. Indeed, the contrast between the treatment accorded these petitioners and that accorded others who have made identical challenges concerning violations of the Court Reporter Act is so sharp as to indicate a most egregious and unfair discrimination against these petitioners. The supervisory power of this Court must be invoked if this intolerable situation is to be corrected.

1. The Conflict With the Morgan Case

In *United States* v. *Morgan*, 346 U.S. 502, 512, this Court held not only that the coram nobis remedy is still available in federal courts by virtue of the All-Writs Statute, 28 U.S.C. § 1651(a), but that where the conditions for pursuing that remedy have been satisfied a motion in the nature of the extraordinary writ of

coram nobis "must be heard by the federal trial court." Otherwise, said this Court, "a wrong may stand uncorrected which the available remedy would right."

There is not the slightest indication in the *Morgan* decision that permission is required from a court of appeals in order for a federal trial court to hold a hearing or make any determination of the merits of a coram nobis petition. Nor is there any basis for implying from that decision that an appellate court may, as a matter of discretion, preclude a trial court from processing such a motion. The *Morgan* ruling is simple and unambiguous—where such a motion is appropriate, it *must* be heard by the federal trial court.

In this case, however, both the trial court and the appellate court have assumed and held that appellate permission is always requisite to the consideration of the coram nobis petition.[1] The Court of Appeals ruled that it would not permit the filing or consideration of such a petition either in the District Court or in the Court of Appeals. This ruling is completely inconsistent with the *Morgan* decision, which in literal effect commands federal trial courts to entertain and resolve coram nobis petitions wherever such procedure is appropriate in order "to achieve justice."

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[1] The District Court relied upon *Strang* v. *United States*, 53 F. 2d 820, *Young* v. *United States*, 138 F. 2d 838, and *Garrison* v. *United States*, 154 F. 2d 106, all Fifth Circuit opinions indicating that to the extent that coram nobis was still available such a remedy could be pursued only with the permission of the appellate court. But all those decisions antedated the *Morgan* decision of this Court and can no longer be considered pertinent. The other case cited by the District Court, *Taylor* v. *Alabama*, 335 U.S. 252, 261, related to requirements of Alabama procedure and has no bearing on federal court remedies.

There can be no question of the propriety of the coram nobis remedy in the instant proceeding. The *Morgan* decision, 346 U.S. at 512, indicated three requisites to the availability of this remedy:

(1) The inability of determining from the record the merits of the claimed error. In the *Morgan* case the plain error related to the alleged improper waiving of counsel. Here, the plain error relates to the hostility and prejudice alleged to have occurred in the prosecutor's summation. In neither situation did the trial record itself permit a determination. And in the instant case the record defect is concededly and solely due to the court reporter's violation of the Court Reporter Act.

(2) The unavailability of other remedies. At this juncture, no remedy other than coram nobis appears available to these petitioners. The *Morgan* decision makes plain, 346 U.S. at 510-511, that the provisions of 28 U.S.C. § 2255, applicable only to prisoners "in custody", does not preclude coram nobis on behalf of those not presently in custody.[2] And the possibility that petitioners might be able to raise the issue on a motion for new trial, within the scope of Rule 33, Fed. Rules Crim. Proc., seems dubious in light of the limitation of Rule 33 confining such motions based on grounds other than newly discovered evidence to the period "with 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."[3]

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[2] Petitioners have continued free on bail pending resolution of the instant problem.

[3] Timely motions for a new trial, filed under Rule 33, had been overruled. Those motions did not raise the issue as to the Court

(3) Sound reasons must exist for failure to seek appropriate earlier relief. Here such reasons do in fact exist. The failure to seek relief any earlier than was done in the direct appeal proceedings simply reflects the difficulty inherent in uncovering a violation of the Court Reporter Act at the trial court stage, a violation that normally is not noticeable or rectifiable until the appellate process is well under way.

During the trial, petitioners had a right to assume that the reporter was fully complying with the absolute dictates of the Court Reporter Act, dictates which the Fifth Circuit itself has described as "mandatory" and as incapable of being waived.[4] No reason thus existed during the heat of trial, particularly at the point of final summations, why petitioners or their counsel should check whether the reporter was continuing to perform his statutory duty of transcribing all the proceedings. If there was any obligation to check, it lay with the trial judge rather than with the petitioners or any attorney. And if this statutory duty

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Reporter Act violation, a matter not then known to the petitioners or their counsel.

But even if another new trial motion could be made under Rule 33, the error of the court below would only be aggravated. The petition sought to be pressed in the courts below was labeled one "in the nature of a writ of error coram nobis for new trial." Since federal procedure is concerned more with substance than technical labels, this petition could be considered a motion for a new trial in the interest of justice. So considered, however, the motion would obviously have to be entertained and resolved. Rule 33 in no way conditions the filing or consideration of such a motion on the permission of an appellate court, even after affirmance has been had of the conviction. *Harrison* v. *United States*, 191 F. 2d 874, 875-876 (C.A. 5); and see *Glasser* v. *United States*, 315 U.S. 60, 87.

[4] See *Stephens* v. *United States*, 289 F. 2d 308, 309 (C.A. 5), and *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6 (C.A. 5).

"cannot be waived" by agreement of the parties, as the Fifth Circuit held in *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6, it would be perverse justice to hold that such a duty and its violation could be waived by virtue of an understandable failure to detect it on the spot.[5] Not until after the trial, when the record of the proceedings had been prepared for appeal purposes, would such a defect normally become apparent.

Moreover, the reporter's statutory violation rendered meaningless for appeal purposes any objection that might have been made to the alleged improper and prejudicial remarks of the prosecutor. The failure to record such remarks prior to making the objection would make it impossible for an appellate court to weigh the force of the objection in the light of what was actually said. As was stated in *Fowler* v. *United States*, 310 F. 2d 66, 67 (C.A. 5), where an objection had been made and ruled upon during the course of an unrecorded summation by a prosecutor and where the judge had instructed the jury to disregard the alleged prejudicial remarks, "The requirement [of the Court Reporter Act] is mandatory and without a transcript of the argument of counsel we are unable to determine whether the United States Attorney made such prejudicial comment as to require reversal."

So completely destructive of appeal rights is such a failure to observe the mandate of the Court Reporter

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[5] Even had the failure been noticed at some time during the summation, an objection at that point would not necessarily have corrected the damage. All that was said to the jury before the objection, including what was possibly prejudicial, would have been unrecorded and incapable of accurate reconstruction. In truth, no amount of objection can cure a reporter's failure to record any appreciable portion of the trial proceedings.

Act, making it impossible for an appellate court to weigh properly any objections that were made or any plain errors that might have occurred, that it should be considered and corrected once the failure comes to light subsequent to the trial. Fairness in the administration of criminal justice far outweighs any understandable neglect in discovering the fatal defect at the earliest conceivable moment.

The seriousness of the violation of the Court Reporter Act, treading as it does upon the efficacy of the appellate process, is dramatically illustrated by this case. And, most importantly, the impact of the violation is such as to remove from petitioners sole responsibility for not having earlier discovered and challenged the violation. Thus in affirming petitioners' convictions and in adjudicating the contention that the prosecutor had overstepped the proper bounds of his function, the Court of Appeals ruled (*Greenhill* v. *United States*, 298 F. 2d 405, 411):

> "As to other errors assigned, *we have carefully reviewed this record* and conclude that appellants had their day in court. They were fairly tried. . . . *There is no reasonable basis for the claim that the prosecutor was too vigorous within the rule of Berger* v. *United States*, 295 U.S. 78. The government was as entitled to an advocate as appellants." [Emphasis added.]

The court thus indicated that it had "carefully reviewed this record" and found that the rule in the *Berger* case had not been violated. But the court was reviewing a record which—due to the reporter's dereliction of duty—did not contain the prosecutor's summation. And the court attempted to satisfy itself that the *Berger* rule—a rule which requires that an appel-

late court actually read the prosecutor's argument"—had not been violated. The impossibility of so doing is self-evident. And the failure of the Court of Appeals to note the absence of the prosecutor's summation in the record which it was carefully reviewing is certainly no less significant than the petitioners' failure at that stage.

Finally, the action of this Court in denying the prior motion to vacate and remand, a motion premised on the conceded violation of the Court Reporter Act, cannot properly be taken as a ruling on the merits of that motion or as foreclosing consideration of a proper coram nobis petition in the trial court. Like the denial of certiorari, the denial of a motion without comment by this Court cannot be taken as a resolution of the merits of the motion. It may have been denied for any one or more of a number of reasons, including a feeling that the matter could more appropriately be resolved in the trial court in a manner permitting the development of a full record as to surrounding circumstances. And since the motion to vacate and remand presented no question as to the propriety or availability of a coram nobis petition in the trial court, this Court's action is not res judicata or the law of the case in that respect.[7]

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[6] In the *Berger* case, 295 U.S. at 85, which dealt with a prosecutor's misconduct in his summation as well as in examination of witnesses, this Court stated:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. *A reading of the entire argument is necessary to an appreciation of these objectionable features.*" [Emphasis added.]

[7] By the same token, the denial of the second petition for rehearing by the Court of Appeals, following the denial by this

In these circumstances, the applicability of the *Morgan* ruling is plain. Coram nobis is the only remedy now available to petitioners if justice is to be achieved as the *Morgan* opinion promised. By their coram nobis petition, they merely sought an opportunity to have a hearing and a determination as to whether the convictions should stand in light of the conceded violation of the Court Reporter Act. That is the historic function of a coram nobis petition. That is the meaning of the *Morgan* decision. The failure of the court below to follow the *Morgan* decision and accord petitioners an opportunity for a day in court merits review and reversal by this Court. See *Rummer* v. *United States*, 347 U.S. 227, 230.

2. The Conflicts With Other Appellate Decisions

The decision of the court below, in refusing to recognize the serious impact of the Court Reporter Act violation on the basic appeal rights of the petitioners, is at war with all recorded appellate decisions dealing with such violations. Every such decision has recognized the mandatory nature of the Act, the frustration of appeal rights resulting from a violation of the Act, and the necessity of reversing a conviction and directing a new trial in order to vindicate the fair administration of criminal justice in this context. The refusal of the court below to follow such rulings or to apply such principles, in the course of refusing petitioners permission even to seek relief through coram nobis, merits the full attention of this Court.

Court of the motion to vacate and remand, cannot be construed as a ruling on the propriety or availability of a coram nobis proceeding. Like this Court's action, the denial of rehearing by the Court of Appeals was without comment and thus without prejudice to pursuing whatever other remedies might be available to petitioners.

Ironically, most of the appellate case law dealing with violations of the mandates of the Court Reporter Act has come from the Fifth Circuit, acting through different panels than involved in the instant proceeding (Judges Rives, Cameron and Bell). In three highly pertinent decisions, the Court of Appeals for the Fifth Circuit has determined:

(1) That the requirement of the Court Reporter Act respecting verbatim recording of all proceedings in criminal cases had in open court "cannot be waived since there must be a specific agreement to waive reporting in other cases.[8] The requirement that all open court proceedings in criminal cases be reported was designed to prevent disputes and questions of veracity all too common under the old system." *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6 (Judges Holmes, Tuttle and Allred).

(2) That the failure of a court reporter to record the examination of veniremen and the arguments of counsel to the jury creates a situation where "we do not see how we can, under Rule 52(a), F.R.Cr.P., 18 U.S.C.A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless." The Court Reporter Act being "mandatory in its requirements," the court held that the judgment of conviction must accordingly be reversed and a new trial had. *Stephens* v. *United States*, 289 F. 2d 308, 309 (Judges Cameron, Brown and Hannay).

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[8] The Court Reporter Acts states categorically with respect to criminal proceedings that all such proceedings in open court shall be recorded. Proceedings "in other cases" must also be recorded "unless the parties with the approval of the judge shall specifically agree to the contrary." Such a waiver or agreement is thus impossible in a criminal case.

(3) That the failure of a court reporter to record the summation of the United States Attorney made it impossible "to determine whether the United States Attorney made such prejudicial comment as to require reversal." Such impossibility existed despite the fact that the record did show an objection to the alleged prejudicial comment and an instruction to the jury to disregard such comment. Once again the direction of the Court Reporter Act was held to be "mandatory" with respect to transcribing final arguments, and any local practice to the contrary was said to be overridden by the Act. And because the failure to record the summation made it impossible to determine the extent of the alleged prejudice flowing from the prosecutor's comment, the conviction was reversed and a new trial ordered. *Fowler* v. *United States*, 310 F. 2d 66, 67 (Judges Jones, Bell and Carswell).

Fair application of the *Stansbury*, *Stephens* and *Fowler* decisions of the Fifth Circuit to the conceded facts of this case would clearly lead to a reversal of petitioners' convictions and the grant of a new trial. The failure to record the prosecutor's summation made it impossible for an appellate court to determine whether the rule in the *Berger* case was satisfied or whether the summation contained plain or harmless error within the meaning of Rule 52, as the *Stephens* case recognized; even had petitioners registered an objection to the prosecutor's comments when made, the failure to record those comments rendered the appeal meaningless, as the *Fowler* case held. The reporter's duty to record was so "mandatory" and non-waivable, as the *Stansbury* and *Fowler* cases held, that the drastic remedy of reversing and ordering a new trial is the only just way of correcting so vital a defect.[9]

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[9] State courts have generally recognized that a new trial is the only appropriate way of correcting a failure to record necessary portions of a criminal trial, including the prosecutor's summation.

The failure of the court below to accord petitioners the benefit of its own rulings in these three cases in itself raises serious questions as to the proper and even-handed administration of justice. Petitioners, the innocent victims of a completely unauthorized and illegal practice of a court reporter, should be entitled to seek and to obtain appropriate relief in light of the *Stansbury*, *Stephens* and *Fowler* precedents of the Fifth Circuit. Criminal justice demands at the least equal opportunity to challenge and correct manifest defects in criminal procedure.

But more than the failure of the court below to follow its own controlling precedents is the conflict between the decision in this case and that of other circuit courts respecting the point at which violations of the Court Reporter Act may be raised. Both the Court of Appeals for the Fourth Circuit (*United States* v. *Taylor*, 303 F. 2d 165, 169) and the Court of Appeals for the District of Columbia Circuit (*Poole* v. *United States*, 250 F. 2d 396, 399) have, in the course of collateral appeals under 28 U.S.C. § 2255, considered previously unchallenged violations of the Court Reporter Act and taken appropriate action in light thereof.[10] Consider-

See *Wiswell* v. *State*, 173 P. 662, 14 Okl. Cr. 517; *Commonwealth* v. *Kimble*, 144 A. 2d 598, 187 Pa. Super. 490; *State* v. *Thomas*, 264 P. 1017, 38 Wyo. 72.

[10] In the *Taylor* case, the Fourth Circuit made plain that it was not holding that the failure to record a portion of a criminal trial "is of itself an error that can be raised by a motion to vacate sentence under § 2255 but we are of the opinion that it is a matter which may be considered in a collateral proceeding in determining whether a defendant is entitled to a hearing on a motion to vacate sentence and in determining whether the sentence should be vacated." 303 F. 2d at 169. In the instant case, petitioners also seek consideration of the reporter's statutory violation in determining whether a coram nobis hearing is appropriate and whether the convictions should be reversed. Here the efficacy of the appellate process, as well as the violation of the Court Reporter Act, is under consideration.

ation of this type of violation in subsequent § 2255 proceedings, even though not raised earlier, leads inescapably to the conclusion that such a violation can and should be considered by the courts below at the present juncture of this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment below reversed with directions to permit petitioners a hearing on their coram nobis petitions. Elemental standards of criminal justice, as well as the necessity for vindicating the command of Congress in the Court Reporter Act, so dictate. Should this Court feel, however, that mandamus is more appropriate than certiorari to deal with the erroneous denial of permission by the Court of Appeals, petitioners have filed simultaneously herewith a conditional motion for leave to file a petition for a writ of mandamus.

Respectfully submitted.

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February 23, 1963.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,439

KALMAN GREENHILL, FRANK PROCTOR, JR., also known as FRANCIS E. PROCTOR, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal From the United States District Court for the Northern District of Alabama

(January 4, 1963)

Before RIVES, CAMERON, and BELL, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition to this court for permission to be granted to the United States District Court for the Northern District of Alabama, Southern Division, to entertain and hear the petition of appellants in the nature of writ of error coram nobis for new trial be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the petition for leave to file petitions in this court on behalf of appellants in the nature of writ of error coram nobis for a new trial be and the same is hereby DENIED.

RIVES, Circuit Judge, concurring specially:

For ought that appears, the petitioners and their counsel knew that the court reporter was not taking down or recording the oral arguments of counsel at the time of such failure, but did not object. It affirmatively appears that the court reporter was present during the entire oral argu-

ments of counsel for the purpose of noting objections by either party, but no objections were made. The claimed grossly erroneous and prejudicial arguments now relied on were certainly fresh in the minds and memories of petitioners and their counsel following the jury's verdict, but the petitioners in their motions for new trial failed to assert them as a basis for relief. It seems to me that there was no good reason for petitioners' failure to object at the trial to the non-recording of the oral arguments and to the claimed prejudicial arguments when made, or for their failure to supplement the record on motion for new trial, in either of which events the objections now raised could have been fully presented on their appeal. It follows, I think, that no sufficient need appears for the extraordinary remedy of a writ of coram nobis.

I therefore concur specially.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 14592 Criminal Action

UNITED STATES OF AMERICA

v.

KALMAN GREENHILL and FRANK PROCTOR, JR., et al.,
Defendants

Order

This cause came on for hearing at this time upon the petitions of defendants, Kalman Greenhill and Frank Proctor, Jr., for a writ of error coram nobis; and upon consideration thereof, the Court is of the opinion, in view of the fact that the Court of Appeals has affirmed the judgment of conviction, the petitions should have been in the first instance presented to that Court. *Strang* v. *United*

States, 53 F. 2d 820; *Young* v. *United States*, 138 F. 2d 838; *Garrison* v. *United States*, 154 F. 2d 106; and *Taylor* v. *Alabama*, 335 U.S. 252, 261. The Court is, therefore, of the opinion that the orders of December 3 and December 5, 1962, copies of which are annexed to said petitions, should be vacated and the hearing upon the petitions should be continued pending a ruling of the Court of Appeals in respect to the granting of such permission.

It is, therefore, ORDERED, ADJUDGED and DECREED that the orders of December 3 and December 5, 1962, hereinabove referred to, be and the same are hereby vacated, and a hearing upon the petitions be and the same are hereby continued.

Done and Ordered, this the 7 day of December, 1962.

H. H. GROOMS
District Judge